SUPREME COURT, U. S.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

NO. 73-1018

UNITED STATES OF AMERICA,
Petitioner,

vs.

MARTIN DeWALT MAZURIE, ET AL.,
Respondents.

BRIEF OF THE STATE OF WYOMING AS AMICUS CURIAE IS SUPPORT OF JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF OF *AMICUS CURIAE* STATE OF WYOMING

INTEREST OF THE STATE

The State of Wyoming, for the protection of the welfare, health, peace, morals and safety of the people of Wyoming, has provided for the regulation of all spirituous, fermented and malt liquors sold within the boundaries of the State. (Laws 1935, ch. 87 §1; C.S. 1945 §53-201; C. S. 1957 §12-1). The regulatory scheme for alcoholic beverages is found in §§12-1 through 12-46, Wyoming Statutes, 1957, 1973 Cum. Supp. Under the provisions of the Wyoming Alcoholic Beverages Act, any qualified person may apply for a license to sell liquor, but the number of licenses issued within any one city, town or county is limited by statute. (§12-6, Wyoming Statutes, 1957, 1973 Cum. Supp.). Upon successful application, the licensee is given a "personal privilege" entitling him to sell liquor for one year; thereafter, the license must be renewed annually. (§12-13, Wyoming Statutes, 1957).

The Wyoming Alcoholic Beverages Act further provides for the protection of those within the State by providing for the license to be suspended or revoked through a court action brought in the name of the State of Wyoming by the attorney general, or any county or prosecuting attorney or through a hearing procedure before the Wyoming Liquor Commission, both actions being subject to a later appeal. (§12-29, Wyoming Statutes, 1957). Thus, the State of Wyoming has protected those within its boundaries from the evils of unregulated liquor traffic and, further, provided protection, through appellate action, to those that have expended their energies and funds necessary and prerequisite to being granted a valid Wyoming liquor license. Respondents in this case are, and have been a holder of a valid liquor license issued under the authority of and subject to the laws of the State of Wyoming.

Further, a liquor license must be renewed annually. If application is made for renewal, and the application denied, an appeal is authorized to the appropriate State District Court (§12-11, Wyoming Statutes, 1957).

SUMMARY OF ARGUMENT

1. The court of appeals did not err in holding the phrase, "non-Indian communities" to be unconstitutionally vague as applied to Respondents. The statute in question is not reasonably understandable because it does not give the beholder an understanding of what is proscribed.

2. The State of Wyoming has sole jurisdiction of this liquor license as the land in question is fee patented and owned by non-Indians. The State of Wyoming has statutory mechanics which embody not only protection to the public, but due process safeguards to the possessor of the liquor license. The Wyoming Supreme Court has held that a liquor license is a privilege and thus, this privilege is protected accordingly. The Tribes' ordinance not only usurps the authority of Wyoming, but completely disregards due process of law.

ARGUMENT

I

THE COURT OF APPEALS DID NOT ERR IN HOLDING THE PHRASE "NON-INDIAN COMMUNITIES" TO BE UNCONSTITUTIONALLY VAGUE AS APPLIED TO RESPONDENTS.

Referring to 18 U.S.C. 1154(c), the court of appeals held:

> **We must hold that the terminology of "non-Indian community" is not capable of sufficiently precise definition to serve as an element of the crime herein considered, aside from other factors or elements with similar infirmities. (487 F. 2d at 18).**

The analysis found on page 17 of the opinion of the court of appeals clearly illustrates the problems with the statute. First, the testimony adduced at the trial shows there was no real agreement on community boundaries. Second, there was uncertainty on the definition of a non-Indian. Most importantly, the government could not carry its burden on proving an essential jurisdictional element of the crime (i.e., that the crime was not committed on fee-patented lands in a non-Indian community). PROOF OF THIS JURISTICTIONAL ELEMENT WAS NOT UPON THE RESPONDENTS. The court of appeals said, "The placing of such a burden on defendants was inproper." (487 F. 2d at 18). The discussion in this paragraph is illustrative of the futility in applying 18 U.S.C. 1154 to the facts before this Court. As stated by this Court in *United States v. National Dairy Products Corp.*, 372 U.S. 29:

> **Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. (372 U.S. at 32-33).**

The simple fact is that Respondents because of the wording of 18 U.S.C. 1154(c) could not "reasonably understand" that their conduct in selling liquor was prohibited.

Petitioner in its brief makes the argument that, "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." (p. 12, Petitioner's Brief). Further, Petitioner argues that Respondents were advised their conduct in selling alcoholic beverages violated the pertinent Federal Statutes. This reasoning is very unsound because if a statute is constitutionally vague, a request to comply with it, coupled with a threat of prosecution, is not going to correct or legitimize the constitutional infirmities. The argument is unsound.

ARGUMENT

II

THE STATE OF WYOMING HAS SOLE JURISDICTION OF RESPONDENTS' LIQUOR LICENSE AND PROVIDES A DUE PROCESS PROCEDURE FOR THE REGULATION OF SAID LIQUOR LICENSE.

Amicus is interested in 18 U.S.C. 1154 not being applied to Respondents, and those similarly situated on the Wind River Indian Reservation, who own fee-patented land. As stated in the "Interest of the State" in this brief, the State of Wyoming has the statutory mechanism to regulate alcoholic beverages for its licensees. These statutes are set out in the "Interest of the State" herein.

Further, *Amicus* is interested in Respondent's situation herein for the reason that Ordinance No. 26 requiring a Tribal license for the Blue Bull Bar conflicts with the sovereign right of the State of Wyoming to license and police those who sell alcoholic beverages in the State.

The Wyoming Supreme Court has held that a liquor license is a privilege. *Johnson v. Smith*, 455 P. 2d 244. A liquor license may be revoked or suspended for violations of the Act. (§12-28, Wyoming Statutes, 1957, 1973 Cum. Supp.), but not without due process safeguards to the licensee. For a recent case involving a thirty-day suspension of a liquor license, *see*, *Rancher Bar and Lounge v. State*, 514 P. 2d 634.

Aside from the fact that the State of Wyoming had issued a license to Respondents and had jurisdiction over the sale of liquor therein, Ordinance No. 26 of the Tribes affords Respondents not a semblance of due process safeguards relating to what the Wyoming Supreme Court has held a privilege. *Johnson v. Smith, supra.* Under the tribal ordinance in question, the Respondents' license and those similarly situated on the Reservation, could have their licenses not issued, suspended, revoked or cancelled, *ex parte* by the Indian Business Council without due process of law and in disregard of the liquor laws of Wyoming. The most unconscionable feature of this procedure of the Tribes is that Respondents have absolutely no voice or vote in the Tribes' governmental decisions on the Reservation.

It is the position of *Amicus* that once Indian title has been extinguished and a non-Indian holds the land in fee, the jurisdiction of the State, for all purposes of government is full and complete.

On the alcoholic beverage question, this Court has spoken in *Clairmont v. United States*, 225 U.S. 551:

> **The simple criterion is that to all lands thus described it was Indian country whenever the Indian title has not been extinguished, and it continued to be Indian country so long as the Indian had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by treaty which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case. (225 U.S. at 556).**

Perrin v. United States, 232 U.S. 478 is distinguishable from this disestablishment theory for the reason that in *Perrin*, the Yankton Sioux ceded lands to the United States. Part of the agreement related to a prohibition against the sale of alcoholic beverages.

The Supreme Court of Wyoming in two (2) cases has

used the disestablishment theory to the effect that extinguishment of Indian title places jurisdiction in the State. In *State v. Moss*, 471 P. 2d 333, the Wyoming Supreme Court concluded that an alleged crime committed within the City of Riverton, Wyoming, which is within the exterior boundaries of the Wind River Reservation, was not within "Indian Country." The defendant was, therefore, subject to the penal laws of the State of Wyoming.

In *Blackburn v. State*, 357 P. 2d 174, a criminal case, Chief Justice Blume of the Wyoming Supreme Court said:

> **Counsel for appellants say that the title to the territory here involved has not been entirely extinguished. They refer particularly to the Act of August 27, 1958, and say that the United States Government in disposing of the land acted merely as agents for the Indians. We think counsel are in error in their conclusions. Construing the Acts of Congress together, we think, as the trial court held, that the title of the Indians to the lands in the territory here involved has been extinguished and that the only right reserved to the Indians is in the money or proceeds received by the United States from the sale or lease of any rights in the land. (357 P. 2d at 179).**

The point is that extinguishment of title places jurisdiction in the State. The foregoing is illustrative of the principle that when Indian title is extinguished, the State assumes jurisdiction. It just isn't a "no man's land".

Referring to the land on which the bar herein is located, the court of appeals said:

> **The appellant's tavern is located within the exterior boundaries of the Reservation on a small tract of land patented in fee by the United States in 1954 under 24 Stat. 390 and 34 Stat. 182 to appellants' predecessor. The patent contains no restrictions as to the use to**

> **which the land may be put. The land is taxed by the State of Wyoming. and the state provides the usual public services for it. It is in a Fremont County School District which provides schools for the area. and on a county road. (487 F. 2d at 16).**

Surely, the State of Wyoming has sole jurisdiction of the liquor license herein.

The State of Wyoming in its sovereign capacity recognizes the self-governing powers of the Indian Tribes including their right, in their sovereign capacity, to regulate tribal members and property within the jurisdictional boundaries of the tribes. However, the Respondents in this matter, located on land that is not within the jurisdiction of the tribes, is thus subject to State regulation.

Finally, *Amicus* will not discuss Arguments II and III found in Petitioner's Brief for the reason that the issues discussed therein are *dicta* in the decision of the court of appeals.

CONCLUSION

For the foregoing reasons, the judgement of the court of appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, Jerome F. Statkus, Assistant Attorney General for the State of Wyoming, do hereby certify that I served the within and foregoing BRIEF OF THE STATE OF WYOMING AS AMICUS CURIAE IN SUPPORT OF THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT upon counsel for Petitioner by placing one copy thereof in the United States mail, postage prepaid, addressed to the respective attorneys of record on September 12, 1974, as follows:

To Robert H. Bork, Solicitor General
Department of Justice
Washington, D. C. 20530

To Wallace H. Johnson, Assistant Attorney General
Department of Justice
Washington, D. C. 20530

To Harry R. Sachse, Assistant to the Solicitor General
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To Jacques B. Gelin, Attorney
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